

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application by SBC Communications, Inc.,)	
Southwestern Bell Telephone Company, and)	CC Docket No. 01-194
Southwestern Bell Communications Services, Inc.)	
d/b/a Southwestern Bell Long Distance for)	
Provision of In-Region InterLATA Services in)	
Arkansas and Missouri)	

COMMENTS OF MCLEODUSA

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SUMMARY

SBC's joint application for provision of In-Region InterLATA services in Arkansas and Missouri should be denied. Aside from some rate reductions, some revisions to its new collocation tariff, and aside from its purported correction of problems with its LMOS data system (regarding which SBC has twice filed false affidavits before this Commission) SBC has little to show by way of improvement since the Commission's denial of its last 271 application in CC Docket # 01-88. SBC's revisions clearly do not erase the fatal flaws in SBC's joint application, namely: (1) many of SBC's Missouri UNE rates, including those recently reduced, are still inexplicably higher than the same rates offered by SBC in its sister states of Kansas and Arkansas; (2) virtually half of all of SBC's UNE rates remain interim; (3) many of the UNE rates arbitrated by the Missouri Commission do not appear to be set in accordance with TELRIC principles; (4) CLECs continue to experience significant problems with SBC's OSS and UNE provisioning; (5) SBC has a past history in Missouri of anti-competitive behavior that has clearly constrained and continues to constrain competition, especially facilities-based competition; and (6) SBC has demonstrated little if any track record of current performance of 271 requirements but, rather, relies on promises of future performance in the form of last minute revisions to a newly filed and untested interconnection agreement.

Granting SBC's Joint Application would erode the public interest test to an meaningless exercise. Not only does SBC fail miserably to comply with the public interest test, it seeks to circumvent the requirement that it have fully implemented and be currently providing all checklist items prior to 271 approval. The Commission must reemphasize these requirements in order to ensure that the markets at issue are truly open to meaningful competition.

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COMMENTS OF MCLEODUSA

McLeodUSA Telecommunications Service Inc. (“McLeodUSA”)¹ submits these comments concerning the above-captioned Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company (“SWBT”), and Southwestern Bell Communication Services, Inc. d/b/a Southwestern Bell Long Distance (collectively “SBC”) for Provision of In-Region, InterLATA Services in Arkansas and Missouri filed August 20, 2001 (“Joint Application”).² For the reasons stated herein, the Federal Communications Commission (the “Commission” or “FCC”) should deny SBC’s Joint Application.

¹ McLeodUSA is a competitive local exchange carrier (“CLEC”), providing integrated telecommunications services, including local service, to business and residential customers in first, second, third and fourth tier markets in a total of 25 states throughout the Midwest, Southwest, Northwest and Rocky Mountain regions. McLeodUSA is primarily a facilities-based provider, with 396 ATM switches, 50 voice switches, approximately 1.1 million local access lines, and more than 10, 700 employees. McLeodUSA has been offering competitive local services to small and medium sized business via resale since 1995 and to residential customers since 1996. McLeodUSA has been providing facilities-based services since early 1997. McLeodUSA’s average business customer has 5 lines. McLeodUSA has invested over \$30 million in Missouri, having installed 3 class 5 DS-3 switches, and owning 450 route miles of fiber optic cable. McLeodUSA employs approximately 400 and serves over 70 markets in the state. McLeodUSA currently has 5,300 business customers and 1,400 residential customers in Missouri.

² *Comments Requested on the Application by SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Arkansas and Missouri*, Public Notice, CC Docket No. 01-194, DA 01-1952, released August 20, 2001.

I. INTRODUCTION

SBC's application should be denied because SBC has engaged in a pattern of anti-competitive conduct that has significantly threatened the ability of CLECs to provide facilities-based services in Missouri.³ As a result, SBC has very little Missouri specific performance data upon which to base its Application. Rather, SBC bases its application primarily on its 271 approval in Texas, Kansas and Oklahoma and on its future promise to perform under its just recently filed (and just recently amended) Interconnection Agreements and Collocation Tariffs. Not only does SBC have no track record of compliance with respect to its brand new interconnection agreement, the interconnection agreement is in a state of flux, containing numerous interim rates terms and conditions from which SBC is presently attempting to back away via various pending dockets spun off from its Missouri 271 proceeding. SBC's Application should also be denied because what limited evidence is available indicates that SBC has failed to meet the performance requirements necessary for approval.

SBC has a history of excessive UNE pricing. SBC has a history of oppressive collocation pricing, terms and conditions. SBC has a history of anti-competitive behavior, highlighted by its recent improper refusal to recognize CLECs as participants in the Missouri Metropolitan Calling Area Plan ("MCA"). SBC's new Joint Application, following close on the heels of this Commission's denial of its previous Missouri 271 application, offers little and insufficient improvement.⁴

³ These Comments focus primarily on the portion of SBC's Joint Application relating to Missouri. With respect to the portions of SBC's Joint Application relating to Arkansas, McLeodUSA concurs with the Comments of El Paso Networks, LLC and PacWest Telecom, Inc. filed in this case.

⁴ Given that SBC has offered so little by way of substantive improvement from its previous Missouri 271 Application, McLeodUSA requests that Commission incorporate into this docket in their entirety (except where specifically modified herein) the *Comments of McLeodUSA* dated April 24, 2001 ("April 24th Comments"), and the *Reply Comments of McLeodUSA*, dated May 16, 2001, both of which were filed with the Commission in CC Docket 01-88.

SWBT continues to engage in anti-competitive behavior in Missouri which violates the Federal Telecommunications Act of 1996 (47 U.S.C. Section 251 et seq.)(the “Telecom Act”) and continues to significantly fail to meet numerous requirements set forth in the Competitive Checklist contained in Section 271(c)(2)(B) of the Telecom Act.

II. SBC’S RECENT REDUCTION OF SOME OF ITS UNE RATES FAILS TO CURE FATAL FLAWS IN ITS JOINT APPLICATION WITH RESPECT TO CHECKLIST ITEM 2

A. Missouri UNE Rates Have Historically Been (And Continue To Be) Excessive, Largely Interim, And Non-TELRIC Based

SBC has had a history in Missouri of UNE pricing that circumvents TELRIC principles, that has created barriers to entry for CLECs, and that fails to comply with 271 checklist requirements.

As required by the MPSC, SBC’s current M2A contains three types of rates for unbundled network elements (“UNEs”):

1. Interim rates developed from case number TO-98-115;
2. Approximately 95 “orphan UNE rates” which had previously never been arbitrated in Missouri, to which the MPSC determined the Texas T2A rates should apply on an interim basis; and
3. Arbitrated rates from case number TO-97-40 arbitrated by the MPSC.

SBC’s Joint Application presents the FCC with a much different situation regarding UNE pricing than the FCC has been faced with in any other 271 application to date. Virtually half of the rates for UNEs in the M2A are interim and many remain excessively high. The Commission should reject the Joint Application on these grounds alone. Although the Commission has indicated that it would be willing to approve a 271 application with a limited number of interim rates, the Commission has stressed that it is

clearly preferable to review a section 271 application on the basis of rates derived from a permanent rate proceeding.⁵ The Commission has also indicated that it would become more reluctant to continue approving 271 applications containing interim rates, as time passed and states had sufficient time to complete permanent rate proceedings.⁶

Section 252 of the Telecom Act requires that state commissions set just and reasonable rates for network elements based upon the cost of providing the network element. This Commission has further required that prices for UNEs are to be based on the Total Element Long Run Incremental Costs (“TELRIC”) of providing those elements.⁷ The FCC has the responsibility and the authority to conduct its own investigation and make its own findings regarding the reasonableness of the rates that are at issue in a Section 271 application.⁸ The FCC may, however, rely heavily on the rate making decisions made by applicable state commissions.

In evaluating whether a state commission has properly set rates, it is appropriate for the FCC to consider the price-setting process which the state commission went through, as well as the actual prices set by the state commission.⁹ In setting rates, a state commission must have endorsed forward looking costs principles, as well as having selected forward looking methodology and inputs in order for its rates to be determined to be in compliance with TELRIC principles.¹⁰ If “basic TELRIC principles are violated or the state commission makes clear errors in factual findings in matters so substantial that the end result falls outside of the range that the reasonable application of TELRIC

⁵ Bell Atlantic New York at paragraph 260.

⁶ *Id.*

⁷ FCC Massachusetts Order ¶ 16.

⁸ 47 U.S.C.A. Section 271 (d)(3)

⁹ Memorandum Opinion and Order, *in re; application of Verizon New England Inc., Bell Atlantic Communications Inc., (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for authorization to provide In-Region InterLATA services in Massachusetts*, FCC No. 01-9 (April 16, 2001 ¶ 38-40)

principles would produce,”¹¹ the FCC should find that the prices set by a particular state commission violate section 252 of the Telecom Act. The Commission should make such a finding in this case and conduct an independent review of all Missouri UNE rates.

The Missouri Public Service Commission (“MPSC”) has had ample time to complete permanent rate proceedings concerning UNE pricing, but has failed to do so. The MPSC has also failed to demonstrate an adherence to the FCC’s TELRIC pricing standards. Ninety-five of the UNE rates contained in the M2A have never been arbitrated at all. The UNE rates arbitrated by the MPSC in case number TO-98-115 have remained interim for over two years. In that proceeding the MPSC conducted a hearing in November of 1997, and the case has been fully briefed since January of 1999, with virtually no activity since then.

Many of the interim UNE rates from MPSC case TO-98-115, which are now part of SBC’s M2A, are excessively high. For example, the Missouri arbitrated rate for dark fiber cross connects is \$47.00 versus \$1.71 in Texas. The Missouri arbitrated rate for DS1 entrance facilities is \$162.30 (recurring) and \$471.00 (non-recurring) versus \$76.96 and \$73.25, respectively, in Texas. The approval of such high rates coupled with the failure to complete arbitrations on UNE rates, suggests that the MPSC has not made a commitment (or, at the least, made it a priority) to establish permanent UNE rates according to TELRIC principles.

The MPSC established Case No. TO-2001-438 on February 25, 2001 to determine the recurring and non-recurring rates for UNEs. As a result it is not certain what the rates for half of the UNEs contained in SBC’s M2A will be, whether they will be established in accordance with TELRIC principles, or when they will be established. For this reason

¹⁰ FCC Massachusetts Order ¶ 20.

alone, the FCC should refrain from granting SBC 271 approval in Missouri until such time as the pricing set for UNEs is demonstrably brought into compliance with TELRIC and other FCC requirements.

The Department of Justice (“DOJ”) highlighted in its Evaluation filed in CC Docket 01-88 numerous problems with SWBT’s provisioning of UNEs that CLECs attempting to compete with SWBT in Missouri have experienced first hand for a number of years. SWBT’s rates for UNEs are excessively high, largely interim in nature, and are not based on the TELRIC methodology as mandated by this Commission.¹²

The DOJ expressed significant concerns with SWBT’s excessive pricing of UNEs in Missouri, noting that SWBT’s Missouri pricing was far out of line with its prices anywhere else in its region.¹³ Specifically, the DOJ found it striking that SWBT’s switch rates in Missouri exceed the switch prices in Texas and Kansas by 22 to 60%,¹⁴ and that SWBT’s loop prices in Missouri are 20% higher than those in other SWBT states.¹⁵ Additionally, nonrecurring charges, particularly those associated with analog port lines, are also significantly higher in Missouri than those in other SWBT states.¹⁶ Although SBC has recently filed and received approval for a reduction of many of these Missouri rates (discussed in more detail below), many of the newly reduced rates are still at levels in excess of Kansas and Arkansas. Furthermore, the newly reduced rates have not been subject to a formal proceeding by the MPSC.

Even more troublesome are the interim rates set by the Missouri PSC in Docket No. 98-115. These rates exceed, by a vast margin, the rates for UNEs in states where

¹¹ FCC New York Order ¶ 244.

¹² *DOJ Evaluation* at 10-19.

¹³ *Id.* at 10.

¹⁴ *Id.*

¹⁵ *Id.* at 10-11.

¹⁶ *Id.* at 11.

SWBT has already received 271 approval. Missouri monthly recurring charges exceed corresponding Texas, Kansas, and Oklahoma rates two to six times, while Missouri nonrecurring charges exceed Texas, Kansas and Oklahoma rates by two to thirteen times!¹⁷ As noted by the DOJ, confirming an ongoing refrain from CLECs to the MPSC, there is no cost basis for such a wide disparity of UNE rates:

A comparison of USF costs for Missouri with those of Texas and Kansas, however, suggest that the difference in the tariffed prices described above exceeds any cost differences between the states. The comparison of Missouri and Kansas is particularly telling as these are adjacent states with nearly identical costs, according to the USF model. Despite this apparently close relationship, Missouri average loop rates exceed Kansas's rates by 20 to 25 percent, and Missouri switch usage rates exceed those in Kansas by more than 50 percent.¹⁸

Additionally, the non-recurring charges in Missouri for certain UNEs have been 100% to 200% higher than corresponding UNE charges in other states, and in one case was 469% higher.¹⁹

Also troublesome is the failure of the Missouri PSC to establish permanent, TELRIC-based rates for many UNEs. As noted by the DOJ, "[t]he interim rates set in Docket No. 98-115 are extraordinarily high and have been left as interim for years, despite concerns having been raised that the rates were not forward looking."²⁰ Furthermore, the DOJ found that "a review of [the Missouri PSC's] decisions on several key questions of method and inputs raise a number of serious questions as to compliance with forward-looking cost principles."²¹

¹⁷ *Id.* at 12.

¹⁸ *Id.* at 12-13.

¹⁹ Sprint Comments at 3-10.

²⁰ *DOJ Evaluation* at 19.

²¹ *Id.* at 14.

That SBC's UNE rates are excessive, largely interim and not TELRIC-based, each highlights SBC's failure to demonstrate compliance with the 271 checklist, and each constitutes independent grounds for denial of its application.

B. SBC's "Voluntary" Reduction of Certain UNE Rates

Although SBC's UNE rates, which were excessively high and arguably not TELRIC compliant, were a major factor in the FCC's decision to reject SBC's previous Missouri 271 application, SBC has styled a proposed reduction in UNE rates in its Joint Application as "a further voluntary reduction in UNE rates." SBC generally describes this proposed rate reduction as follows:

Recurring rates for certain loops are reduced by an overall average of 10%, with greater reductions for two wire analog loops in the rural zone and no reduction for two-wire analog and digital loops in the urban zone. Recurring rates for certain signaling, switching, and transport, namely recurring local switching and tandem switching rates, recurring blending transport, common transport and certain dedicated transport rates, and recurring charges for SS7 transport and STP port-per port are reduced by an overall average of 18.5%. The non-recurring rate for an analog port is reduced by 95%.²²

Although these rate reductions are an improvement over previous rates, SBC presented no evidence to the MPSC that the new rates are the appropriate rates as of August 30, 2001. As Commission Gaw noted:

This Commission has heard no evidence as to the appropriateness of these rates as of the date of this order. It can only say that the rates are lower and thus deductively better for competition than rates approved in a previous case.²³

Nonetheless in its August 30, 2001 order, the MPSC accepted SBC's revised Missouri interconnection rates, despite the fact that SBC provided no evidence indicating that such rates were currently appropriate in Missouri and, even more troublesome, without giving

²² SBC Joint Application, Hughes Missouri Affidavit par. 56, and Attachment C thereto.

²³ MPSC Case No. TO-99-227, MPSC Order dated August 30, 2001, Gaw, Concurring Opinion p. 1.

CLECs and opportunity to challenge the appropriateness of those rates. As

Commissioner Gaw further noted:

However, they [the parties in this case] have not agreed that the lower rates are low enough nor has this Commission made any updated inquiry into that issue. What we do know is that the rates volunteered to Missouri are higher than Texas and Kansas. More striking, Missouri's rates are higher than the rates just volunteered by SWBT to Arkansas – a state that is more rural and with more difficult terrain than Missouri. These are important factors in the difference in prices, according to counsel for SWBT.²⁴

SBC's rate reductions, though a step, albeit a small one, in the right direction, do little to correct the deficiencies found in its earlier Missouri 271 application. Many of the rates offered by SBC in Missouri are inexplicably still significantly higher than Texas, Kansas, and Arkansas. Furthermore, SBC's reduction for recurring loop rates for two wire analog and digital loops do not apply in urban markets, where CLECs, due to economic factors, have necessarily been forced to concentrate their market entry until a better competitive toehold is achieved. This is especially true now more than ever, given the precarious status of the CLEC industry.

SBC's voluntary rate reduction also applies only to rates previously approved by the MPSC in case number TO-97-40. Therefore the same questions and concerns raised by the DOJ as to whether the rates approved in case TO-97-40 are TELRIC compliant

²⁴ Id. at p. 2. Commissioner Gaw is referring to comments made by SBC Counsel Paul Lane before the Missouri Commission on August 16, 2001 (See Transcript of proceedings Case Number To-99-227, Missouri Public Service Commission, pp. 3395-3399). The August 16, 2001 proceeding before the MPSC took the form of a presentation by SBC to the MPSC regarding SBC's intention to file its Joint Application, and regarding the revised UNE rates SBC would be proposing. Although CLECs were allowed to be present and comment, CLECs had no opportunity to present evidence concerning SBC's proposed rates, nor did CLECs have the opportunity to test the basis for SBC's proposed rates. Nonetheless, based on SBC's Comments at the August 16 presentation, the MPSC issued an order on August 30, 2001 accepting SBC's revised UNE rates. The MPSC issued this order despite the fact that several parties to the case, notably McLeodUSA and the Office of Public Counsel, had filed motions requesting that the MPSC reopen Case No. TO-99-227 and conduct evidentiary proceedings concerning the new evidence presented by the parties and concerning any new evidence submitted by SBC. Unfortunately, the MPSC declined to investigate the new evidence or SBC's proposed rates.

still remain. Additionally, the voluntary rate reduction does nothing to erase the fact that virtually half of SBC's Missouri's UNE rates still remain interim.

Furthermore, many of the rates contained in SBC's interconnection agreement are subject to true-up pending the completion of various rate proceedings before the MPSC. The history of non-competitive rate setting in Missouri, as highlighted by the DOJ (see above) affords McLeodUSA with little confidence that competitive, TELRIC compliant rates will be set in these proceedings. Thus, this Commission should refrain from making any determination regarding SBC's 271 joint application until such proceedings are completed by the MPSC.

The DOJ indicated that the "continued uncertainty of so many rates, coupled with the doubts about the pricing discussed *supra* gives rise to doubts that the market is open to competition by firms that seek to use those elements."²⁵ Nothing has transpired since SBC's Missouri 271 application was previously denied to change this.

C. SWBT Historically Has Provisioned Collocation in Missouri Under Terms and Pricing That Are Discriminatory and Anti-Competitive

In addition to excessive UNE pricing, SBC has previously provided collocation to CLECs in Missouri on an individual case basis ("ICB"). SBC's ICB approach to collocation resulted in excessive pricing, long and uncertain provisioning intervals and other onerous terms and conditions. SBC continued to provision collocation on an ICB basis for years in Missouri, despite the fact that in almost every other state RBOCs had either been required to file, or had voluntarily filed, collocation tariffs. Indeed, SBC had already filed collocation tariffs in Texas, Kansas and Oklahoma but was still refusing to

²⁵ DOJ Evaluation p. 19.

file a collocation tariff in Missouri until several months after it renewed its Missouri 271 application before the MPSC. Prior to its renewed Missouri 271 application, SBC resisted efforts to require it to file a Missouri collocation tariff. Correspondingly, CLECs were placed at an unjust competitive disadvantage in Missouri the result of encountering great uncertainty and frustration with respect to collocation pricing and provisioning intervals. This uncertainty was extremely detrimental to the ability of CLEC's to make and implement business plans for market entry and expansion. As AT&T witness Steve Turner has noted, "it's very difficult to enter a market when there are large numbers of unknowns as to how much it's going to cost you to build out a network, and what it's going to cost you to order key components of that network from an unbundled standpoint."²⁶

In the last few weeks, however, SBC has reached a settlement with the parties to MPSC Case No. TO-2001-298 regarding collocation, and has amended its collocation tariff in accordance with this settlement. McLeodUSA believes SBC's revised collocation tariff presents a great opportunity for CLECs to obtain collocation under prices, terms and conditions that will comply with the Telecom Act. As promising as SBC's new collocation tariff is, however, the fact remains that SBC cannot yet demonstrate a track record in Missouri of compliance with the 271 requirements concerning collocation. SBC's collocation tariff has just been amended and there has not been an opportunity for the parties to operate under the agreement. The new collocation tariff provides great promise that SBC can and will comply with Section 271 collocation requirements in the future. However, the new tariff cannot erase overnight years of poor collocation performance by SBC. SBC must demonstrate actual performance of the 271

²⁶ AT&T, Turner, MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2298.

collocation requirements by performing in accordance with the new collocation tariff. Additionally the mere filing of the tariff cannot and does not immediately develop the track record of collocation performance necessary for 271 checklist compliance. The Staff of the MPSC concurs with the need for SWBT to establish a track record of collocation compliance in Missouri prior to Section 271 approval being granted, and has noted:

Staff believes that regardless of what method is used to implement collocation (tariff or M2A), and regardless of what state the offering in Missouri may potentially be patterned after, the Staff fully supports the offer being in place for a period of time *before* this Commission makes its decision regarding approval of SWBT's Section 271 application.²⁷

Indeed, a brand new tariff under which no competitor has operated, provides virtually no evidentiary support for 271 purposes, as there is no demonstration that competitors are actually able to appropriately compete under the tariff.²⁸

III. SBC'S OSS AND UNE PROVISIONING FAIL TO COMPLY WITH THE COMPETATIVE CHECKLIST

As a result of SWBT's conduct in screening CLEC MCA NXXs (discussed at length on pages 3-13 of McLeodUSA's April 24th Comments, SWBT erected a one and a half year barrier to entry for CLECs wishing to provide facilities-based service in Missouri MCA Plan markets. As a result McLeodUSA's experience with SWBT's operational support systems ("OSS") and provisioning of Unbundled Network Elements ("UNE") is somewhat limited. Nonetheless, it is clear to McLeodUSA from its experience with SWBT and from the evidence presented by other CLECs, that SWBT has failed to demonstrate that its OSS and UNE provisioning passes muster.

²⁷ MPSC Staff, *Response to Second Q & A Session*, Case No. TO-99-227, p. 27.

²⁸ See Testimony of IP Communications, Siegel, TO-99-227, Transcript of Proceedings, pp. 2837-38.

In addition to the numerous problems with SWBT's OSS and provisioning of UNEs outlined at pages 26-29 of McLeodUSA's April 24th Comments, McLeodUSA has since experienced additional problems in this area.

A. SBC Failed To Provide MCA Service To McLeodUSA's UNE-P Customers

Since the issuance of the Commission's March 6th and 15th orders supporting SBC's 271 application, McLeodUSA has experienced significant problems with ordering UNE-P service from SBC. On or about March 20, 2000, McLeodUSA ordered UNE-P service from SBC for several of the new McLeodUSA customers who had chosen to switch service from SBC to McLeodUSA.²⁹ Each of these customers was a subscriber to the Missouri Metropolitan Calling Area Plan ("MCA"), and each customer lost their MCA service after they were moved from SBC service to UNE-P service with McLeodUSA.³⁰

McLeodUSA contacted SBC promptly after learning that its customers were losing their MCA service as a result of their switch to McLeodUSA UNE-P service. SBC's initial response was that MCA service was not available to McLeodUSA with UNE-P service.³¹ Despite numerous inquiries from McLeodUSA, SBC maintained this position for over a month. Then, on or about May 1, 2001, SBC notified McLeodUSA that it did in fact offer MCA service with UNE-P service. However, it took over an additional three weeks for SBC to adequately explain the correct ordering procedure for requesting MCA service with UNE-P and to actually provision such orders correctly.³²

²⁹ See Affidavit of McLeodUSA witness Diane Bowers, attached hereto as Exhibit A.

³⁰ Id.

³¹ Id.

³² Id.

Even after SBC had finally explained the correct procedure for ordering MCA service with UNE-P, SBC continued to reject McLeodUSA UNE-P orders that requested MCA service until on or about May 24, 2001.³³

SBC's failure to provision adequate UNE-P service on a timely basis demonstrates significant problems with its OSS and constitutes a violation of item 2 of the competitive checklist (Nondiscriminatory Access to Network Elements).³⁴

B. SBC Purposely Disconnected Several of McLeodUSA's IDSL Customers Without Notice

On or about May 23, 2001, McLeodUSA filed an amendment to its SBC Missouri Interconnection Agreement which provided that McLeodUSA would be able to order IDSL service from SBC and sell that service to its own customers. The amendment was signed on May 7, 2001 by McLeodUSA, and on May 18, 2001 by SBC. The amendment indicates that it would be effective immediately upon signature. Despite this amendment, which clearly authorized McLeodUSA to provide IDSL service, SBC unilaterally, and without notice to McLeodUSA or its IDSL customers, disconnected all of McLeodUSA's IDSL customers on July 18, 2001.³⁵ SBC also began rejecting any new orders that McLeodUSA placed for IDSL service at or about this time.³⁶

Thus, once again, similar to the MCA situation, when faced with what it perceived as a competitive issue, SBC took unilateral action without seeking clarification from the MPSC, and without even notifying McLeodUSA. Despite being contacted immediately about its improper disconnection of McLeodUSA's IDSL customers, it was not until August 7, 2001, after McLeodUSA emphatically emphasized the language in the

³³ Id.

³⁴ Section 271(d)(2)(B) Federal Telecommunications Act, 47 U.S.C. Section 251 et. seq. (the "Telecom Act")

³⁵ Affidavit of Diane Bowers

³⁶ Id.

amendment to the interconnection agreement authorizing IDSL service, that SBC finally determined that the amendment to the interconnection agreement was effective and provided notification to McLeodUSA that it would accept McLeodUSA's IDSL orders.³⁷

Thus, once again, similar to the UNE-P/MCA issue discussed above, something that should never have been an issue for SBC in the first place, became one, and took far too long for SBC to resolve internally. As a result 66% of McLeodUSA's IDSL customers who were disconnected on July 18, 2001 declined to reestablish DSL service with McLeodUSA.³⁸

IV. GRANTING SBC'S JOINT APPLICATION WOULD THWART THE PUBLIC INTEREST ANALYSIS AND OTHERWISE FRUSTRATE THE CONGRESSIONAL INTENT OF THE TELECOM ACT

If an RBOC is granted 271 approval without complying with a meaningful application of the public interest test and without demonstrating a history of compliance with checklist items, an RBOC is free, and indeed encouraged, to prevent meaningful competition from taking place in a state until it is ready to seek 271 approval. The Telecom Act requires that markets must be open to competition prior to the granting of 271 approval. A granting of 271 approval simultaneous with the opening of a market is not what Congress envisioned, but it is exactly what SBC has attempted to effectuate in Missouri. SBC has attempted to cover up its history of anti-competitive treatment of CLECs and the lack of meaningful competition in Missouri by slapping together a new interconnection agreement on the eve of its 271 filing and then borrowing rates terms and performance data from other states. This approach to 271 compliance is not in

³⁷ Id.

³⁸ Id.

accordance with the manner in which the competitive checklist is to be implemented, nor with the public interest analysis.

A. Legal Standards; promises of future performance are not enough.

The ability of a Regional Bell Operating Carrier (“RBOC”) to provide in-region, InterLATA services is conditioned on strict compliance with section 271 of the Telecom Act. Thus, SBC should not be authorized to provide in-region, InterLATA service under Section 271 unless it is able to demonstrate that: (1) it satisfies the requirements for Track A or B entry;³⁹ (2) it has *fully* implemented and is *currently providing* all of the items set forth in the competitive checklist; (3) the requested authorization will be carried out in accordance with Section 272; and (4) its entry is consistent with the public interest, convenience and necessity.⁴⁰ As to the *is current providing* standard, the FCC has found that promises of *future* performance have no probative value in demonstrating *present* compliance.⁴¹ To support its application, an RBOC must submit actual evidence of present compliance, not prospective evidence that is contingent on future behavior.⁴²

SBC’s Joint Application, however, is based largely on the promise of future performance. The Joint Application is also based in large part on SBC’s InterLATA approval in Texas, Kansas and Oklahoma, rather than on actual compliance with 271 requirements in Missouri (which it is unable to demonstrate at present).

³⁹ RBOCs may enter an application based on one of two “tracks” established under Section 271(c)(1). Track A requires the RBOC to prove the presence of an unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers. Section 271(c)(1)(A)(I). Track B requires the RBOC to prove that no unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers has requested access and interconnection to the RBOC network within certain specified time parameters. Section 271(c)(1)(A)(II). SWBT is applying under Track A.

⁴⁰ Telecom Act §271(d)(3).

⁴¹ FCC New York Order, ¶37. States have also adopted this standard, *see In re BellSouth Telecommunications, Inc.’s entry into InterLATA services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 6863-U, (Ga. P.S.C. Oct. 15, 1998).

⁴² *Id.*

SBC is essentially saying since we have been approved in Texas, Kansas and Oklahoma, give us InterLATA approval in Missouri, then we will comply with the section 271 requirements in Missouri. Section 271 simply does not allow such a scheme. The fact that SWBT was granted InterLATA entry in Texas and elsewhere, however, has no bearing on whether SWBT should be granted InterLATA entry in the state of Missouri. Each application made by an ILEC for InterLATA entry must be examined independently on its own merits, and the issue of whether an ILEC has satisfied its section 271 obligations must be determined on a case by case basis after review of a totality of circumstances of that particular application.⁴³

B. Section 271(c)(2)(B)

In its evaluation of past Section 271 applications the FCC has mandated that an RBOC demonstrate that it “is providing” each of the offerings enumerated in the 14-point competitive checklist codified in Section 271(c)(2)(B).⁴⁴

In enacting the competitive checklist, Congress recognized that unless an RBOC has *fully* complied with the checklist, competition in the local market will not occur.⁴⁵

The FCC has steadfastly held that applications under Section 271 should be granted only when the local market in a state has been fully and irreversibly opened to competition.⁴⁶ Furthermore, each and every checklist item is significant. The FCC has

⁴³ *Application of Bell Atlantic Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in New York*, CC Docket No. 99-295 Memorandum Opinion and Order, (December 21, 1999) (“hereinafter, “FCC New York Order”), ¶46, and *In the Matter of Application by SBC Communications, Inc., /Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas*, CC Docket No. 00-65 Memorandum Opinion and Order, FCC 00-238 (rel. Jun. 30, 2000) (hereinafter, “FCC Texas Order”), ¶46.

⁴⁴ See *Application of BellSouth Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd. 539, ¶78 (1997) (citing *Ameritech Michigan Section 271 Order*, ¶110).

⁴⁵ *Ameritech Michigan Section 271 Order*, ¶18.

⁴⁶ FCC Texas Order ¶417; FCC New York Order, ¶423.

clearly indicated that failure to comply with even a *single* checklist item constitutes independent grounds for denying an application for 271 authority.⁴⁷ Thus, strict compliance with each requirement of Section 271 is necessary to ensure that sustainable competition will be realized in local markets. SBC clearly fails to meet these standards, as demonstrated by its UNE pricing and poor performance with respect to OSS and provisioning UNEs. The April 24th Comments of McLeodUSA also discuss in detail a variety of checklist violations which still occur at present.

C. Section 271(d)(3)(C) The Public Interest Test

Compliance with the competitive checklist does not end the analysis of a 271 application, however. An RBOC must demonstrate that granting its application will serve the public interest, convenience and necessity. The public interest analysis contained in Section 271(d)(3)(C) of the Telecom Act is an independent element of the 14-point checklist.⁴⁸ As indicated by the FCC:

The public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, we view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as congress expected. Among other things we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this application. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application.⁴⁹

⁴⁷ FCC Texas Order ¶418; FCC New York Order ¶424.

⁴⁸ FCC Texas Order ¶417; FCC New York Order ¶423.

⁴⁹ FCC Texas Order ¶416; FCC New York Order ¶423.

Thus, the Commission could find that SWBT had satisfied each and every item on the 14-point checklist and still deny SWBT's renewed application if the public interest analysis requirements are not met.⁵⁰

The FCC has indicated that all relevant factors are to be considered in the public interest analysis and has indicated a number of factors as being probative. These factors include: a) performance monitoring with self executing enforcement mechanisms to ensure compliance; b) optional payment plans for new entrant CLECs for the payment of non-recurring charges to lessen unreasonably high upfront costs; c) whether all pro-competitive entry strategies are available to new entrants in different geographic regions in different scales of operation; d) whether such strategies are available to other requesting carriers upon the same rates terms and conditions; e) state and local laws that impact on competition; and f) the existence of discriminatory or anti-competitive conduct on the part of the RBOC.⁵¹ As discussed more fully on pages 58-62 of the April 24th Comments of McLeodUSA, SBC falls far short of meeting a number of these factors in significant ways.

Despite the FCC's clear statements regarding the independent nature of the public interest standard, SBC attempts to distort the meaning of the public interest analysis by blurring the distinction between the public interest analysis and the competitive checklist. At the October 2000 Q&A Session before the MPSC, SWBT indicated to the MPSC that compliance with the 14-point checklist alone is all that is necessary for approval of its

⁵⁰ In addition to the language contained in the FCC's New York and Texas Orders concerning the public interest analysis the FCC has also indicated that "although the competitive checklist prescribes certain, minimum access and interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to entry to the local telecommunications market have been eliminated, or that a BOC will continue to cooperate with new entrance after receiving in-region, InterLATA authority." *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd. 20542, ¶30 (1997) ("FCC Michigan Order").

application. “The public interest is truly that, the public interest, and it should not be used as a means to add to the 14-point checklist.”⁵² Indeed there appears to have been some confusion on the part of the Missouri Commission as to whether the public interest analysis stood apart on the competitive checklist.⁵³ In evaluating SBC’s application, the MPSC focused its limited public interest analysis solely on the benefits of SBC’s future provisioning of long distance service and on SBC’s promise to participate in the Performance Assurance Plan.⁵⁴

As discussed more fully at pages in McLeodUSA’s April 24th Comments, numerous additional factors demonstrate that it is not in the public interest for SBC to be awarded 271 approval.

D. SWBT’s Anti-Competitive Conduct Was Intended To Restrict CLECs From Offering Facilities-Based Service In Missouri Until SWBT Was Ready To Obtain 271 Approval

SBC’s conduct and its testimony demonstrate that it intended to restrict CLECs from engaging in facilities-based competition until it received approval to provide in-region, InterLATA service. As discussed at length in McLeodUSA’s April 24th Comments, SBC has systematically engaged in a pattern of anti-competitive conduct in Missouri that has precluded meaningful facilities-based service competition from developing. SBC denied CLECs access to the MCA⁵⁵ and has demonstrated a long

⁵¹ FCC Michigan Order ¶387, 391, and 393-397.

⁵² SWBT witness Hughes, MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2496.

⁵³ MPSC Case No. TO-99-227, Transcript of Proceedings p. 2438.

⁵⁴ CC Docket No. 01-88, *Written Consultation of Missouri Public Service Commission* at 86-89 (April 18, 2001).

⁵⁵ SWBT’s conduct concerning the MCA plan demonstrates a high degree of discriminatory and anti-competitive behavior. SWBT unilaterally and without warning to CLECs began programming its switches to screen CLEC MCA NXX prefixes such that CLEC MCA customers were not treated like participants in the MCA plan. SWBT engaged in this behavior despite the fact that numerous previous MPSC orders recognized CLECs as MCA plan participants. SWBT engaged in this behavior despite the fact that it, itself, had recognized CLECs as participants in the MCA plan with respect to resold services, UNE-P services, and ported numbers. SWBT refused for months to negotiate a solution for CLECs, and resisted

history in Missouri of imposing excessive rates and anti-competitive terms for provisioning of UNEs and collocation.

At the October Q&A Session before the MPSC, SWBT witness Thomas Hughes highlighted the fact that SWBT had not yet satisfied the Competitive Checklist, by indicating that if the M2A is approved, SWBT would then be in compliance with the Competitive Checklist.⁵⁶ Additionally, SWBT witness Becky Sparks confirmed that the availability of the M2A (and, thus, SWBT's compliance with the Competitive Checklist) was conditioned on a favorable recommendation from the MPSC on SWBT's 271 application.⁵⁷ This testimony, together with SWBT's above-noted history of creating anti-competitive barriers to CLEC facilities-based competition, leads to the inescapable conclusion that SWBT intended to delay and block CLEC efforts to provide facilities-based services in Missouri until it was granted authority to provide InterLATA services in Missouri. This conduct has been very harmful to CLECs operating in Missouri, as the ability to offer facilities-based services is crucial.

V. CONCLUSION

SBC distorts the meaning of the public interest analysis by equating it with the competitive checklist. SBC also attempts to evade the "is providing access and interconnection" standard contained in Section 271(c)(2)(A)(i)(I), and the "fully implemented" standard set for the in Section 271(d)(3)(A), by historically thwarting competition up to the time it is ready to seek 271 approval, and then basing its checklist compliance on a last minute filed interconnection agreement under which it has no track

every effort the CLECs made to obtain expedited relief from the MPSC. When it did finally come to the table, SWBT attempted to circumvent the MPSC's authority and impose an improper 2.6-cent MCA surcharge on CLECs which also violated several provisions of the Telecom Act. See McLeodUSA's April 24th Comments at pp.3-13.

⁵⁶ MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2314.

record of actual performance whatsoever. SBC message to the Commission is “give us 271 approval and then we will actually start complying with all of the 271 requirements, we promise.” The MPSC at first bristled at SBC’s quid-pro-quo approach to 271 approval and indicated to SBC that it would not recommend SBC’s application because it was still not in compliance with several checklist items. Despite some strong initial language from the MPSC, however, all SBC was ultimately required to do was to make some modifications to its Missouri interconnection agreement. SBC was never required by the MPSC to actually demonstrate performance under the interconnection agreement. This quid-pro-quo approach to 271 approval is not in accordance with the intent of the Telecom Act, and should be rejected by this Commission.

SBC’s Joint Application has come before this Commission without an adequate application of the public interest test and without an adequate demonstration of actual checklist performance.

McLeodUSA respectfully urges the Commission to reemphasize the public interest requirement, and to reemphasize the “is currently providing” and “fully implemented” standards that form some of the cornerstones of Section 271. The importance of the application of the public interest requirement should not be overlooked, and was recently highlighted by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.⁵⁸ In that letter the Senators stated:

The public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state

⁵⁷ Id. at 2597.

⁵⁸ Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) (“*Senators’ Letter*”).

of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.⁵⁹

McLeodUSA respectfully submits that newly filed interconnection agreements and tariffs cannot provide the basis for 271 approval without a demonstration of sustained performance thereunder. In its evaluation the Commission should pay particular attention to both SBC's history of anti-competitive conduct, and the lack of development of meaningful competition in Missouri. As noted by the DOJ, there is significantly less competition to serve residential customers in Missouri and less competition in Missouri by CLECs seeking to provision service via UNEs, including UNE-platform.⁶⁰ The DOJ also noted the ample evidence indicating that facilities-based competition may have been "constrained" by SWBT's failure to satisfy its obligations under the Federal Telecom Act.⁶¹ McLeodUSA knows from its own experience that SWBT has deliberately constrained competition in Missouri. As a result, SWBT should not be awarded the brass ring of 271 approval until it has demonstrated a meaningful track record of compliance with the requirements set forth in section 271. There can be no doubt that such a track record does not yet exist in Missouri.

⁵⁹ *Id.* at 3.

⁶⁰ *DOJ Evaluation* at 6-7. The DOJ indicated that the low level of use by competitors of UNE-platform in Missouri contrasts sharply with the New York and Texas markets where UNE-platform allowed competitors to expand rapidly into residential markets.

⁶¹ *Id.*

Respectfully submitted,

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